No. 88-1916

IN THE

Supreme Court of the United States

October Term, 1989

STATE OF MINNESOTA,

Petitioner,

vs.

ROBERT DARREN OLSON,

Respondent.

ON WRIT OF CERTIORARI TO THE
MINNESOTA SUPREME COURT

BRIEF OF THE STATES OF CONNECTICUT, DELAWARE, INDIANA, KANSAS, KENTUCKY, MICHIGAN, MISSISSIPPI, MISSOURI, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA AND WYOMING, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., NATIONAL SHERIFFS ASSOCIATION, INC., AND MINNESOTA COUNTY ATTORNEYS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONER STATE OF MINNESOTA

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224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

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INTEREST OF AMICI

This brief is submitted by amici pursuant to Sup. Ct. R. 36.2 and 36.4 in support of the State of Minnesota's petition for a writ of certiorari.[1]

The interests of all the amici states are similar. On the first issue, if this Court articulates an explicit set of factors clarifying when a guest in another's home has a legitimate expectation of privacy, it will eliminate the need for prosecutors to revisit continually the same ground in the lower courts. On the second issue, the articulation by this Court of a clear definition of exigent circumstances will give the police much needed guidance about when they can enter a home without a warrant to make an arrest.

The National District Attorneys Association, Inc. (NDAA) is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publications, and amicus curiae activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The International Association of Chiefs of Police, Inc. (IACP) is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform and amicus curiae advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

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[1] Pursuant to Rule 36.2, written consent of the parties to the filing of the brief by the amici associations is being filed at the same time as this brief. The amici states are sponsored by their respective attorneys general and therefore, pursuant to Rule 36.1, consent for them is not necessary.

The National Sheriffs Association, Inc. (NSA) is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting all rights guaranteed under the Constitution.

The Minnesota County Attorneys Association (MCAA) is the statewide organization representing all felony prosecutors in Minnesota and has some purposes similar to those of the NDAA, with a particular focus on the criminal justice system in Minnesota.

SUMMARY OF ARGUMENT

I. Legitimate Expectation of Privacy.

A legitimate expectation of privacy cannot be determined by a "bright line" and must be developed on a case-by-case basis. *Rakas v. Illinois*, 439 U.S. 128 (1978). Lower courts have developed their own, often inconsistent factors. This Court's guidance is needed to achieve greater consistency.

Amici suggest ten factors that may apply in cases where a guest challenges a warrantless entry into someone else's house. Among the more significant factors are: (1) ability to exclude others from the property; (2) possession of a key; and (3) whether the accused has been allowed to stay in the house alone.

II. Exigent Circumstances.

In order to arrest a suspect, the police may make a warrantless entry into his home or into a third party's home if

there are exigent circumstances. *Payton v. New York*, 445 U.S. 573 (1980); *Steagald v. United States*, 451 U.S. 204 (1981). Exigent circumstances were not present in either *Payton* or *Steagald* and this Court left the initial application of the exigent circumstances exception to the lower courts.

Police officers in the field need a definite, easily understood definition of exigent circumstances so that they know when they can make a warrantless entry. Amici's suggested definition is: (1) hot pursuit, or, (2) specific and articulable facts justifying a belief that (a) the suspect is dangerous, or (b) he may escape, or (c) evidence may be lost. The definition does not explicitly require considering whether the delay in getting a warrant poses a risk that danger, flight, or evidence loss may occur. However, this is unnecessary since, by the very nature of these risks, they will exist and pose a risk as soon as the officer becomes aware of their possible presence. The risk will exist at the time the officer decides whether to make a warrantless entry or obtain a warrant and thus necessarily exists during the delay that would be caused by getting a warrant.

If there are exigent circumstances, the police should not be required to stake out a house and wait for a warrant.

ARGUMENT

I. THIS COURT SHOULD ARTICULATE A LIST OF FACTORS FOR LOWER COURTS TO CONSIDER IN DETERMINING WHETHER A GUEST HAS A LEGITIMATE EXPECTATION OF PRIVACY IN SOMEONE ELSE'S HOME.

The Fourth Amendment to the United States Constitution provides that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ." The Fourth Amendment secures the rights of people in their own houses, not in the houses of others. Therefore, a guest cannot challenge a warrantless entry into another's home unless he has a legitimate expectation of privacy there.

Rakas v. Illinois, 439 U.S. 128 (1978) rejected the "bright line" rule of "legitimately on the premises" and held that the question of when a guest has a legitimate expectation of privacy must be developed by a case-by-case analysis. *See* discussion at 439 U.S. 144-48.[2] In the ensuing decade, the lower courts used different factors, accorded the factors different significance, and even attempted to articulate new "bright line" rules. *See* amici brief in support of petition for certiorari at 5-10. Amici respectfully submit that this Court

[2] For example, officers do not need a bright line. Absent exigent circumstances, consent or a warrant, they should not enter a home to arrest a guest anyway, even if the guest lacks a legitimate expectation of privacy. Likewise, if the officers are doubtful about whether the house is the suspect's "home," so that an arrest warrant under *Payton* (445 U.S. at 602-03) instead of a search warrant under *Steagald* (Rehnquist, J., dissenting, 451 U.S. at 231) would suffice, they can, in the absence of any exigency, simply obtain a search warrant.

should articulate a list of factors that should be considered by the lower courts in determining whether a guest has a legitimate expectation of privacy.

A. The Factors.

Amici suggest the following factors are appropriate ones to consider:

(1) the ability or right to exclude other persons from the premises;

(2) possession of a key to the premises;

(3) the type of guest that the accused is;

(4) partially paying some of the owner's expenses;

(5) whether the accused was allowed to stay at the premises alone;

(6) the accused's historical (or prior) use of the premises, including the length and frequency of any visits and whether his presence was uninterrupted or sporadic;

(7) the extent of the accused's freedom to use the premises, including whether there were any restrictions on rooms he had access to, or any restrictions on his use of the house's equipment or appliances;

(8) what personal effects of the accused were at the premises, how long they had been there, whether they were just stored there or whether the accused had access to use them on an ongoing basis, and whether they represented most or all of his worldly possessions or just a few miscellaneous items;

(9) the precautions taken by the accused to develop and maintain his privacy in the premises;

(10) the accused's objective expectation of privacy and the reasonableness of that expectation.

B. Discussion Of Factors.

1. *Ability to Exclude Others.* As this Court said in *Rakas*:

> One of the main rights attaching to property is the right to exclude others, *see* W. Blackstone, *Commentaries* Book 2, ch. 1, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.

439 U.S. at 144, n. 12. If one can exclude all others, one's expected level of privacy is significant.

The ability to exclude others, however, should not be confused with the ability of the guest to entertain his own guests. The ability to admit others does not add to privacy. If anything, it diminishes privacy.

2. *Possession of Key. Rakas* observed that the accused in *Jones v. United States*, 362 U.S. 257 (1960) clearly had a legitimate expectation of privacy in his friend's apartment. *Rakas* noted that, among other things, Jones had a key to the apartment that he let himself in with. *See* 439 U.S. at 149. Owners[3] have keys; mere guests do not. Possession of a key allows one to come and go as one pleases. It lets the guest exclude others when the owner is not present. However, if a guest does not possess a key, his comings and goings are often dictated by the schedule of the house's owner.

3. *Type of Guest.* Guests range from a salesman to an adult child who has been temporarily living in his parents' house for a few months. Persons not actually living there, such as tradesmen, dinner guests or party guests, would have little likelihood of any privacy expectation. And someone not living there who did have an expectation, such as the accused in

[3] "Owner" in this discussion (at 7 to 11) includes leasors, renters and similar persons.

Jones, would need to have many of the other factors supporting this expectation.

4. *Helping with Expenses.* A guest is unlikely to have any ownership interest in the property. However, if he helps the owner pay items such as the utility bills, rent, or mortgage payments, this could help support an expectation of privacy.

5. *Staying Alone in the House.* The accused in *Jones*, who had a legitimate expectation of privacy, was allowed extensive use of the apartment while the owner was away. When the owner allows the guest to remain in the house alone, this not only affords the guest the privacy normally associated with solitude, but also is an indication that the guest is more like "one of the family" than a casual guest.

6. *Prior Use of Premises.* When a guest has actually been living in the house, the length and continuity of his presence may indicate whether he is analogous to a regular tenant instead of a mere guest. *See* (in another context) *Steagald v. United States*, (Rehnquist, J., dissenting) 451 U.S. 204, 230-31 (1981):

> If a suspect has been living in a particular dwelling for any significant period, say a few days, it can certainly be considered his "home" for Fourth Amendment purposes. . . . [and] the police could enter the premises with only an arrest warrant.

(In *Steagald*, however, the minimum of four days that the DEA agents believed Lyons had been staying in Steagald's residence—*see* 451 U.S. at 206—was not sufficient to make it Lyon's "home.")

7. *Restrictions.* If the guest is not allowed access to certain areas of the house, or is not permitted to do things such as help himself to the contents of the refrigerator, his expectation of privacy is not very high.

8. *Personal Effects.* A guest who has moved in lock, stock and barrel differs from one who remains overnight with nary a toothbrush. While the number of one's worldly possessions has nothing to do with a legitimate expectation of privacy, their location indicates whether the premises is equivalent to one's own home.

9. *Precautions to Maintain Privacy.* Precautions taken by a guest to maintain his privacy may depend upon how much freedom the owner allows him. Attempts to maintain privacy may be prevented by the owner, and thereby lower a guest's expectation of privacy.

10. *Objective Expectation of Privacy.* Sometimes offhand comments by the suspect (such as complaining about the fact that the owner will not give him a key, doesn't trust him in the house alone, and limits his time in the bathroom) could all be objective manifestations of a lack of any subjective expectation of privacy.

Some courts have suggested that the ownership, use or control of seized property should be a factor in deciding whether the person has a legitimate expectation of privacy. *E.g.*, *United States v. Haydel*, 649 F.2d 1152 (5th Cir., 1981). However, it should not be a factor in determining a privacy expectation in another's home.[4] For example, defendants A and B could both be guests under identical circumstances and use and keep identical personal property on the premises. That being the case, the seizure of A's, but not B's, property should not make any difference in determining whether either had a legitimate expectation of privacy in the premises.

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[4] Mere ownership, possession or use of seized property, does not necessarily mean that the person has a legitimate expectation of privacy. *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *United States v. Salvucci*, 448 U.S. 83, 92 (1980).

An accused who has no privacy expectation in another's home may have a privacy expectation in personal property (such as a briefcase) that he has with him, just the same as if he were carrying the briefcase in a public place or in open fields. But the seizure of the briefcase should not give the accused a legitimate expectation of privacy in another's home, any more than it would give him an expectation of privacy in an open field or in a public place.

II. DEFENDANT IN THIS CASE HAD NO LEGITIMATE EXPECTATION OF PRIVACY.

The record in this case affords an opportunity to apply the above factors in a concrete situation.

1. Defendant had no ability to exclude anyone, since the matter was never discussed. 2. He had no key. 3. Defendant was a very temporary guest who was sleeping on the floor. (The real reason for his presence was of course that he was hiding from the police.) 4. He was not helping with the rent payments. 5 and 7. It is unclear whether he was allowed the run of the house or not, but it is clear that he was never allowed to stay there alone. 6. He had only stayed there one night and had slept on the floor. 8. He had only a change of clothes with him and not even a toothbrush. 9. It does not appear that he took any precautions to protect his privacy. 10. There is no indication that defendant believed he had any privacy interest in the Bergstrom's duplex. In short, he had no legitimate expectation of privacy.

Deciding this case is clear cut and does not require any balancing or ranking of the factors. However, the more those factors have in common with ownership, the more importance they should have. These would include: (1) the ability to exclude, (2) the possession of a key, (3) being allowed to be in

the premises alone, (4) having unrestricted use of the premises, (5) living in the premises for a significant, uninterrupted length of time, and (6) maintaining (and using) at the residence a significant portion of one's worldly goods would be such factors. The first three of them would, consistent with *Jones*, be among the more important.

Finally, if a guest has a legitimate expectation of privacy, he will in some respects be comparable to a resident member of the family and may be able to consent to a search of the premises. *See United States v. Karo*, 468 U.S. 705, 724 (1984) (O'Connor, J., concurring). It could also result in an arrest warrant for the accused, instead of a search warrant for the premises, sufficing to justify a nonconsent, nonexigent entry to arrest the guest. *See Steagald v. United States*, (Rehnquist, J., dissenting) 451 U.S. at 230-31. Thus, extending Fourth Amendment protection to a guest may concommitantly diminish the degree of privacy accorded the owner.

III. POLICE OFFICERS NEED CLEAR GUIDANCE ABOUT WHAT EXIGENT CIRCUMSTANCES ALLOW WARRANTLESS ENTRIES INTO A HOME TO MAKE A WARRANTLESS ARREST.

Payton v. New York, 445 U.S. 573 (1980) held that, absent exigent circumstances, the Fourth Amendment prohibits warrantless arrests of a suspect in his own home. *Payton* left "to the lower courts the initial application of the exigent-circumstances exception." *Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984).

Mr. Justice White's dissent in *Payton* predicted that as a result of that case:

> The policeman on his beat must now make subtle discriminations that perplex even judges in their chambers.
>
> . . .

> Further, police officers will often face the difficult task of deciding whether the circumstances are sufficiently exigent to justify their entry to arrest without a warrant. This is a decision that must be made quickly in the most trying of circumstances. If the officers mistakenly decide that the circumstances are exigent, the arrest will be invalid and any evidence seized incident to the arrest or in plain view will be excluded at trial. On the other hand, if the officers mistakenly determine that exigent circumstances are lacking, they may refrain from making the arrest, thus creating the possibility that a dangerous criminal will escape into the community.

445 U.S. at 618-19. An explicit definition, easily understood by police officers, is needed to cure this situation.

Officers should have guidance about exigent circumstances that has the same degree of certainty that custodial interrogation and warrantless searches of vehicles do. *See Miranda v. Arizona*, 384 U.S. 436 (1966) and *United States v. Ross*, 456 U.S. 798 (1982). As Professor LaFave has observed:

> The ultimate purpose of all Fourth Amendment standards is not to keep probative evidence out of criminal trials, but rather to keep police practices within constitutional limits, and this purpose is not served by a rule which cannot be applied correctly with a fair degree of consistency by well-intentioned police officers.

W. LaFave, Vol. 2, *Search and Seizure*, 599 (1987); quoted with approval in Donnino and Girese, *Exigent Circumstances for a Warrantless Home Arrest*, 45 Alb. L. Rev. 90, 112 (1980).

Donnino and Girese, and at least one other commentator, have opined that exigent circumstances cannot be determined by a bright line. 45 Alb. L. Rev. at 115; Note, 6 Hamline L. Rev. 191, 207 (1983). However, both irrelevantly rely on Mr. Justice Powell's concurring opinion in *Rakas v. Illinois*, 439 U.S. 128, 155-56 (1978), which questioned the efficacy of a bright line for a legitimate expectation of privacy, but did not question the efficacy of a bright line for exigent circumstances.

IV. SUFFICIENT GUIDANCE FOR OFFICERS DOES NOT EXIST.

It appears to be generally acknowledged that exigent circumstances are present in the four following types of situations, although not all of them have been explicitly adopted by this Court:

(1) Hot pursuit: *United States v. Santana*, 427 U.S. 38 (1976); *Welsh v. Wisconsin*, 466 U.S. at 750; *Steagald v. United States*, 451 U.S. 204, 221 (1981); *Michigan v. Tyler*, 436 U.S. 499, 509 (1978); *see also*, Donnino and Girese, 45 Alb. L. Rev. at 94-95; Note, 23 Ariz. L. Rev. 1171, 1175 (1981); Note, 62 U. Det. L. Rev. 319, 322 (1985); Note, 6 Hamline L. Rev. at 200 (1983).

(2) Suspect poses danger to officers or citizens: *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967); *see also*, Harbaugh and Faust, *Knock on Any Door—Home Arrests after Payton and Steagald*, 86 Dick. L. Rev. 191, 222, 231 (1982); Donnino and Girese, 45 Alb. L. Rev. at 96; 23 Ariz. L. Rev. at 1180; 62 U. Det. L. Rev. at 323.

(3) Suspect is likely to escape or avoid arrest: *Johnson v. United States*, 333 U.S. 10, 15 (1948); *see also*, Donnino and Girese, 45 Alb. L. Rev. at 96; Harbaugh and Faust, 86 Dick. L. Rev. at 222, 232; 23 Ariz. L. Rev. at 1182; 62 U. Det. L. Rev. at 322.

(4) There is a likelihood that evidence will be lost or destroyed: *Welsh v. Wisconsin*, 466 U.S. at 750; *Michigan v. Tyler*, 436 U.S. at 509; *Schmerber v. California*, 384 U.S. 757, 770 (1966); *Santana* (Stevens, J., concurring), 427 U.S. at 44; *Santana* (Marshall, J., dissenting), 427 U.S. at 45-48; *see also*, Donnino and Girese, 45 Alb. L. Rev. at 96; Harbaugh and Faust, 86 Dick. L. Rev. at 223 and 232; 23 Ariz. L. Rev. at 1177; 62 U. Det. L. Rev. at 322-23.

The challenge is to articulate these exigencies in a form that can be easily used by officers on the street.

A. *Dorman v. United States* Does Not Provide Sufficient Guidance.

Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970), in upholding a warrantless entry to arrest on exigent circumstances, considered a list of seven factors. These seven factors were:

(1) a grave offense is involved, particularly one that is a crime of violence;

(2) the suspect is reasonably believed to be armed;

(3) there is more than the minimum amount of probable cause;

(4) strong reason to believe the suspect is in the premises;

(5) a likelihood the suspect will escape if not swiftly apprehended;

(6) the entry was made peaceably; and

(7) the time of day at which the entry is made.

435 F.2d at 392-93.

Dorman has been widely cited and followed in the lower courts although some have expressed reservations. *E.g.*, Donnino and Girese, 45 Alb. L. Rev. at 100, n. 49, and at 106.

Welsh v. Wisconsin said that "[w]ithout approving all of the factors," *Dorman* was "a leading federal case defining exigent circumstances." 466 U.S. at 751-52.

On the other hand, LaFave says:

> It is thus appropriate to ask whether the *Dorman* rule is too sophisticated to be so applied [by police officers on the scene], requiring as it does the making of on-the-spot decisions by a complicated weighing and balancing of a multitude of imprecise factors.

LaFave, 2 *Search and Seizure* at 599-600. For example, how can an officer decide when one-half of the factors favor the state and one-half favor the accused. *See* LaFave, 2 *Search and Seizure* at 600. Many other commentators have cited LaFave and agree with him. Donnino and Girese, 45 Alb. L. Rev. at 104; Harbaugh and Faust, 86 Dick. L. Rev. at 224-25; 23 Ariz. L. Rev. at 1174; 6 Hamline L. Rev. at 203; *Note*, 13 N.M.L. Rev. 511, 521 (1983); and 58 U. Det. J. Urb. L. 545, 555 (1981).

B. Other Definitions Also Have Drawbacks.

Although *Dorman* is the best known, other methods, including the following definitions, have also been suggested for determining whether exigent circumstances are present:

> In this context, "exigent circumstances" means an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence.

People v. Ramey, 16 Cal. 3d 263, 276, 545 P.2d 1333, 1341, 127 Cal. Rptr. 629, 637 (1976).

> [E]xigent circumstances . . . exist when a reasonably prudent man in the circumstances would be warranted in the belief that delay incident to securing the warrant would pose a significant risk of danger to life or property, of the escape of the suspect, or of the destruction of evidence.

Donnino and Girese, 45 Alb. L. Rev. at 114.

> [Exigent circumstances exist when] the officer (a) has probable cause to believe that a delay to procure an appropriate warrant will gravely endanger the officer or another person, or result in the destruction or removal of evidence or the escape of the suspected felon, and (b) enters or attempts to enter the home where the person is believed to be in a reasonable manner within the time it would have taken him to procure an appropriate warrant under the then existing circumstances.

Harbaugh and Faust, 86 Dick. L. Rev. at 226. Each definition limits exigent circumstances to danger, flight or loss of evidence. However, other elements in the definitions make them unsuitable as guidance for police officers.

The Donnino and Girese and the Harbaugh and Faust definitions emphasize the delay incident to securing a warrant. This has the effect of subordinating and very likely obscuring the significance of the suspect's dangerousness, likelihood of escape or destruction of evidence.

Focusing on the delay incident to securing a warrant is unnecessary. Yet the definitions implicitly suggest to officers that the delay must somehow be responsible for creating the risk.

The articulation of this element in the definition may also cause officers to believe they must predict with precision both

the amount of time it will take to find a judge to sign a warrant and also just exactly what the suspect will do while the officer is away obtaining a warrant. In fact, Harbaugh and Faust would require a belief that the suspect definitely *will* escape or destroy evidence.

Moreover, the type of individual involved is usually unpredictable. This unpredictability, in fact, may often contribute to the exigency of the situation.

Harbaugh and Faust also recommend that, even if there are exigent circumstances, warrantless entries should be permitted only from the time officers obtain probable cause until the time that it would normally take to obtain a warrant. 86 Dick. L. Rev. at 226-27. In effect, this proposal requires an officer to interrupt his investigation immediately after he obtains probable cause and apply for a warrant. This proposal should not be adopted.

First, officers are not required to obtain an arrest warrant and arrest a suspect as soon as they obtain probable cause. *See, e.g., United States v. Watson*, 423 U.S. 411, 431, 449 (Powell, J., concurring and Marshall, J., dissenting); LaFave, 2 *Search and Seizure* at 170.

Second, it would require an officer to interrupt his investigation and possibly miss opportunities to locate additional witnesses or evidence. This is not favored. *See Schmerber v. California*: "Particularly . . . where time had to be taken . . . to investigate . . ., there was no time to seek out a magistrate and secure a warrant." 384 U.S. at 770-71. *See also, Payton v. New York*, (White, J., dissenting) at 445 U.S. 619; and LaFave, 2 *Search and Seizure*, at 608.

Ramey says that its definition, which is endorsed at 13 N.M.L. Rev. 524, is not a litmus test for the presence of exigent circumstances. 16 Cal. 3d at 276, 545 P.2d at 1341, 127

Cal. Rptr. at 637. As such, it fails to provide sufficient guidance for officers.

Unlike Donnino and Girese and Harbaugh and Faust, *Ramey's* definition does not explicitly mention the risk posed by the delay of obtaining the warrant, but it does require a showing that the danger, flight or destruction of evidence is imminent. Danger, flight and destruction of evidence are, by their very nature, imminent. Using "imminent" in the definition implies that these events must somehow be even more imminent than they usually are and may confuse officers and the lower courts.

The same could be said about *Ramey's* inclusion of "swift action" and "emergency situation" in addition to "imminent." Certainly any action to prevent an imminent danger will necessarily be swift. Therefore, including "swift" in the definition implies that it must be even swifter. "Emergency situation" possibly implies that there must be even more of an emergency than, for example, a danger to life. At best, it is redundant, circular, and confusing, since exigent circumstances are, by definition, an emergency.

C. LaFave's Proposal.

LaFave suggests that "a solution is most likely to be found by distinguishing the truly 'planned' arrest from the arrest which is made in the course of an ongoing investigation in the field." LaFave, 2 *Search and Seizure* at 600. The approach makes sense. LaFave's "field arrest" would often occur when the risk of flight or destruction of evidence is at its greatest. A good example is *Dorman*, in which the officers "engaged steadily and systematically in the identification and pursuit of the criminal suspects." *Dorman*, 435 F.2d at 394.

If LaFave's approach is adopted, officers would need a "bright line" between a planned arrest and an arrest in the field, such as the following: If the police decide to arrest a suspect, and promptly arrest him, it would be a "field arrest." However, it would be "planned" if they postponed the arrest because it was not urgent and could be done later. LaFave would also allow a warrantless arrest in the "planned arrest" situation if an exigency subsequently arose. *See* LaFave, 2 *Search and Seizure* at 601.

Unfortunately, it appears possible that some "field arrests" may be "routine arrests." If LaFave's approach would not satisfy the Fourth Amendment under all circumstances, its value to officers would diminish.

V. AMICI'S PROPOSED DEFINITION OF EXIGENT CIRCUMSTANCES WILL SATISFY CONSTITUTIONAL REQUIREMENTS, AND PROVIDE HELPFUL GUIDANCE FOR THE POLICE.

Amici suggest that the following definition of exigent circumstances should be used and applied by this Court:

> Except as limited by *Welsh v. Wisconsin*, police officers may make a warrantless arrest of a suspect in his or another's home when any of the following are present:
>
> 1. There is hot pursuit.
>
> or
>
> 2. An officer is aware of specific and articulable facts justifying a belief that:
>
> a. A suspect is a danger to life, may injure someone, or may cause serious damage to property.
>
> or
>
> b. A suspect may flee or avoid arrest.
>
> or
>
> c. Evidence may be lost, removed or destroyed.

A. This Definition Accurately Articulates Exigent Circumstances That Allow A Warrantless Arrest In A Home.

1. The definition is based upon the well-established doctrines of exigent circumstances discussed *supra* at 13-14. However, unlike many of the authorities and commentators cited there, the proposed definition's three grounds of danger, escape and destruction of evidence do not explicitly articulate any requirement that the delay incident to obtaining a warrant would pose a significant risk. That requirement was not included in order to provide better guidance for police officers. And, as demonstrated by the following discussion, its inclusion was not necessary to satisfy the requirements of the Fourth Amendment.

If the police believe a suspect is dangerous, they believe he is dangerous then and there. They do not believe that he is presently gentle and passive and poses no threat until some time in the future. The suspect is like boiling water that may burn someone at any minute, not like water that has just been put on the stove and has yet to come to a boil.

Likewise, if a suspect wishes to escape or destroy evidence, those actions must, by their very nature, be accomplished rapidly if they are to be effective. Therefore, defendants normally flee or destroy evidence as soon as they perceive the necessity of it and can conceive a plan to accomplish it.

For example, if an officer believes that a suspect is a danger to life, that danger exists at the very moment the officer enters the home without a warrant. If the danger exists then, *a fortiori* the danger would exist during the delay necessary to obtain a warrant. If the officer had decided to seek a warrant, it would have been with the knowledge that the danger could erupt before he was able to type the first word on the warrant application.

2. The proposed definition is consistent with exigent circumstances decisions by this Court. *Johnson v. United States*, 333 U.S. 10 (1948) ruled that the search of the defendant's home in a residential hotel violated the Fourth Amendment because "no suspect was fleeing or likely to take flight" and "no evidence or contraband was threatened with removal or destruction." 333 U.S. at 15. Nor was there hot pursuit or any danger. The proposed definition would reach the same result: no exigent circumstances.

Warden v. Hayden held that there were exigent circumstances. Applying the proposed definition to *Warden* would have the same result because exigent circumstances of danger, escape, and loss of evidence were all present. (Loss of identification evidence was a ground because only a speedy search "could have insured that Hayden was the only man present" in the house to which the male armed robber had fled just minutes before. 387 U.S. at 299.)

Ker v. California, 374 U.S. 23 (1963), *United States v. Santana* and *Welsh v. Wisconsin* would also have reached the same results if the proposed definition would have been used.

B. The Proposed Definition Provides Specific, Helpful Guidance For Police Officers.

The four different, independent grounds should be relatively easy to remember. All are logical and grounded in common sense; for example, if a suspect is on the verge of fleeing, it makes sense to arrest him immediately.

Since the definition does not require an officer to speculate either about how long it might have taken to get a warrant or about what the suspect would do in the meantime, it allows them to base their decision upon known facts rather than upon attempting to predict the future. *See also*, discussion *supra* at 16-17.

The *Welsh* caveat in the proposed definition will require case-by-case determinations for extremely minor offenses. However, that adds nothing to the analysis that *Welsh* currently requires.[5]

C. The Scope Of "Hot Pursuit."

A hot pursuit "means some sort of a chase, but it need not be an extended hue and cry 'in and about [the] public streets.'" *United States v. Santana*, 427 U.S. at 43.

Therefore, warrantless entries "in the nature of a hot pursuit" but in which there is no chase are not covered by hot pursuit in the proposed definition. (*See State v. Chavez*, 98 N.M. 61, 64, 644 P.2d 1050, 1053 (Ct. App. 1982), *rev. denied*, 98 N.M. 336, 648 P.2d 794 (1982)). However, if it is a non-routine arrest, it is probably covered by another ground of the proposed definition, such as flight or destruction of evidence. A good example is *Warden v. Hayden*, briefly discussed *supra* at 21, which has been mentioned in passing as a hot pursuit case. *See Michigan v. Tyler*, 436 U.S. at 509.

D. The "Specific And Articulable Facts" Standard of *Terry v. Ohio* Should Be Used.

This Court has apparently never ruled on whether officers need specific and articulable facts, under *Terry v. Ohio*, 392 U.S. 1 (1968), or the higher standard of probable cause, that exigent circumstances are present. *Welsh v. Wisconsin*,

[5] *Welsh* "will necessitate a case-by-case evaluation of the seriousness of particular crimes, a difficult task for which officers and courts are poorly equipped." *Welsh v. Wisconsin*, (White, J., dissenting) 466 U.S. at 761-62.

However, this case, a first-degree murder conviction, is not an appropriate vehicle in which to reverse *Welsh*.

(White, J., dissenting) mentioned "*probable cause* to believe that the delay involved in procuring an arrest warrant will gravely endanger the officer . . . ." 466 U.S. at 759. (Emphasis added.) However, the specific and articulable facts standard of *Terry v. Ohio* is sufficient. First, the police would still need probable cause that the suspect had committed the crime in order to arrest him. Second, the use of the *Terry v. Ohio* language is limited and applies to three specific types of emergencies (danger, flight, and destruction of evidence) and to no others.

The specific and articulable facts should, of course, include knowledge gained by the officer in previous cases. *See United States v. Sokolow*, —— U.S. ——, 109 S. Ct. 1581 (1989).

The officer's belief should be evaluated only on the basis of information that was available to him. *E.g., Ramey*, 16 Cal. 3d at 276, 545 P.2d at 1341, 127 Cal. Rptr. at 637.[6]

Some courts have held that there cannot be exigent circumstances unless "the officers reasonably believe that [the accused] either knew or was in substantial danger of learning of his imminent capture." *United States v. George*, 883 F.2d 1407, 1414 (9th Cir. 1989). This should not be required. First, officers are unlikely to be privy to what a suspect knows. Second, a suspect who has recently committed a crime may flee or destroy evidence regardless of whether he thinks the police suspect him. In fact, this is precisely the sort of possibility that is present in those situations that are "in the nature of (but not quite) hot pursuit," which are discussed *supra* at 22.

[6] *James v. Superior Court*, 87 Cal. App. 3d 985, 151 Cal. Rptr. 270 (1979), on the other hand, held that there were not exigent circumstances because the defendant was asleep. However, the officers did not know this. (Moreover, one can wake up, even in the middle of the night, and flee or destroy evidence.)

E. The Police Should Not Be Required To Stake Out A Home While They Obtain A Warrant.

Some courts have held that, instead of entering a house without a warrant to make an arrest, the officer should guard or "stake out" the house until a warrant can be obtained. *E.g.*, *State v. McNeal*, 251 S.E.2d 484 (W. Va. 1978), (discussed by Donnino and Girese at 45 Alb. L. Rev. 108-09).

However, a stake out does not prevent the defendant from destroying evidence inside the house. Nor does it necessarily make him any less of a danger. As LaFave points out, a stake out can increase the risk to a hostage, undercover agent or informant who is inside. It also gives the suspect more time to prepare a violent resistance. *See* 2 *Search and Seizure* at 605-06.

A stake out leaves the rest of the public that much more unprotected. As observed in *Steagald v. United States* (Rehnquist, J., dissenting) 451 U.S. at 225-26,

> [W]hile "[t]he police could reduce the likelihood of escape by staking out all possible exits . . . the cost of such a stake-out seems excessive in an era of rising crime and scarce police resources." *Payton v. New York, supra* at 619, 100 S. Ct. at 1397 (White, J., dissenting).

The Fourth Amendment does not require the police to secure a car and wait for a search warrant. *See Arkansas v. Sanders*, 442 U.S. 753, 765, n. 14 (1979). When there are exigent circumstances, it would make even less sense to require police to attempt to surround and seal off a home while they send one of their number to obtain a warrant. *See* Donnino and Girese, 45 Alb. L. Rev. at 112, n. 111.

Payton applies only to routine arrests. If a stake out is necessary, it is not a routine arrest.

F. Even If Police Activity Contributes To The Exigency, A Warrantless Entry And Arrest Should Be Allowed.

Officers should not be required to obtain a warrant as a hedge against the possibility that an exigency may arise in the future. *See* discussion *supra* at 16-18. Some cases, however, have held that, when police activity is responsible for the exigency, a warrantless entry should not be allowed. *See United States v. Santana*, (Marshall, J., dissenting) 427 U.S. at 45-49; *State v. Canby*, 252 S.E.2d 164 (W. Va. 1979); *James v. Superior Court*, 87 Cal. App. 3d 985, 151 Cal. Rptr. 270 (1979).

For example, it is not uncommon for police to interview friends and relatives of suspects. If one of them decides to warn the suspect, the suspect should not be able, for example, to destroy evidence unimpeded while the police are powerless to enter. *See Canby*. Nor should police be discouraged from checking to see if a suspect is in his motel room. *See James*. If it turns out he is not there, valuable time will be lost that could have been used to find out where he actually was.

Some cases would apply this rule only if an officer deliberately fomented an exigency to save the time and bother of a warrant. *See Santana*, (Marshall, J., dissenting) 427 U.S. at 48-49. While this limited approach is more justifiable than the foregoing unrestricted one, there is little likelihood of any such police practice being widespread. No prudent officer would try it because, warrantless entry or not, he could well end up with no evidence and a dangerous criminal at large.

In the final analysis, it must be remembered that it is the suspect, the crimes he committed, his other activities, and his propensities, not the police, that create the exigency.

G. One Type Of Exigency Is Sufficient.

One commentator has suggested that more than one type of exigency should be present before the police can make a warrantless arrest. 13 N.M.L. Rev. at 515. This suggestion should be rejected. For example, a drug dealer who is about to flush his contraband into the sewer is not a danger. And, after he flushed it, he would not need to flee.

H. There Were Exigent Circumstances To Arrest Defendant.

Applying the proposed definition to the facts of this case is a straightforward matter—as well it should be if the definition is to help guide the police. First, the officers had specific and articulable facts to support a belief that defendant was dangerous: he was the getaway driver in a robbery/murder; the robbery was part of a string of robberies; and it was likely that defendant was armed. (Even though the murder weapon had been seized, criminals frequently have more than one gun.)

In addition, the officers had specific and articulable facts to support a belief that defendant might flee or avoid arrest: defendant fled when the police stopped his car; defendant precipitously abandoned his own home and was hiding out at the Bergstroms; and the police had a tip that he was planning to leave town.

CONCLUSION

This Court should articulate the factors to consider in determining whether a guest has a legitimate expectation of privacy in someone else's home. It should also articulate a definition of exigent circumstances that can be easily understood and applied by the officers in the field. Applying respectively the factors and definition suggested by amici requires that the decision of the Minnesota Supreme Court be reversed.

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